REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MSC. CIVIL APPLICATION NO. 414 OF 2014

IN THE MATTER OF AN APPLICATION BY MESHACK OCHIENG' FOR ORDERS OF MANDAMUS AGAINST THE HON. ATTORNEY GENERAL ON BEHALF OF HON. JACOB KAIMENY CABIENET SECRETARY MINISTRY OF EDUCATION AND DR. BELIO R. KIPSANG PRINCIPAL SECRETARY MINISTRY OF EDUCATION

IN THE MATTER OF A DECISION BY THE HON. JACOB KAIMENYI CABINET SECRETARY MINISTRY OF EDUCATION AND DR. BELIO R. KIPSANG PRINCIPAL SECRETARY MINISTRY OF EDUCATION FOR FAILING TO PAY THE DECRETAL AMOUNT AWARD IN MISC. 445 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT

CAP 26 LAWS OF KENYA

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE

RULES CAP 21 LAWS OF KENYA AND ALL

OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC ……APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL …….....……1ST RESPONDENT

DR. BELIO R. KIPSANG, PRINCIPAL SECRETARY

MINISTRY OF EDUCATION…….....…….....……..…2ND RESPONDENT

EXPARTE: MESHACK OCHIENG

RULING

1. What provoked these proceedings was the decree entered in Nairobi HC Misc. Cause No. 445 of 2013 in which judgement was entered for the ex parte applicant herein against the 2nd Respondent in the sum of Kshs 31,873,133.80. That decree was entered by consent and by it the award of the arbitrator was adopted as judgement of the Court.

2. According to the said consent the said sum was made up of Kshs 30,571,250.10 being the principle award and Kshs 1,301,883.70 being the arbitrator's costs. The decree was however silent on costs.

3. Following the delay in settling the said decree the applicant herein instituted these proceedings in which he sought the following orders:

> **a. That an order for mandamus do issue directing the respondents herein to satisfy the decree issued in Nairobi HCC Misc 445 of 2013 whereby Dr. Belio Kipsang was ordered to pay the decretal sum amounting to Kshs.31,873,133.80 together with further interest from the 1st day of April 2014.**
>
> **b. Costs of the application to be provided;**
>
> **c. Such further and any relief that the honourable court may deem just and expedient to grant.**

4. It is agreed by the parties herein that the principle sum has been paid in full. The ex parte applicant however contends that the respondents have withheld the applicant's commercial award from 30th October, 2013 to 10th January, 2017. According to the ex parte applicant, the Arbitrator through his wisdom and the circumstances of the matter herein, in his award dated 20th September, 2013 spelled out in paragraph 5 that 'any portion of the debt/amount awarded, that is not settled within the time frame stipulated under 4 above, will attract compound interest at the prevailing commercial bank lending rate of 17.50% per annum until it is fully settled'. The ex parte applicant submitted that the said award was confirmed on the 18th March of 2014 by the **Honourable Lady Justice Kamau**.

5. According to the applicant, despite the fact that the Contract, the Arbitrator's Award and the Order of 18th March, 2014 provided for compound interest formulae, he conceded to the respondents request for alternative formulae that is simple interest in form of agreement by parties dated 9th March 2010 To the applicant, the rate of the interest as provided by the Arbitrator Award is 17.50% of the prevailing commercial banks rates in accordance to section 48 of the ***Public Procurement and Disposal Act*** No.3 of 2005. It was therefore the ex parte applicant's position that the rate of 12% as submitted by the respondents is not acceptable since what changed was the formulae of computing interest herein in accordance to conditions of contract dated and not the rate of interest.

6. With respect to the applicable rate, it was submitted that this issue was settled when the arbitrator's award spelled that interest is payable at prevailing commercial banks lending rates of 17.50% per annum and it starts to run at the expiry 30 days from the date of the Award. In the ex parte applicant's view, using the simple interest formulae, the principle amount (Kshs.31, 873,133.80) attract interest of 20.50% per annum which translates to Kshs.17,901.30/= per day thereby making the total interest amount due as Kshs.20,855.014.50/-.

7. It was the ex parte applicant's case that despite the Government admitting liability, it sat on the award and failed to factor it in the National budgetary allocation from 2013 to 2017.

8. The applicant therefore asserted that justice demands that the Government pays simple interest since the ex parte applicant is economically aggrieved monetarily in terms of the value of the award. The ex parte applicant therefore claimed the sum of Kshs 20,855,014.40 in respect of the said interest which the applicant calculated at the rate of 20.50%.

9. In support of his case, the ex parte applicant relied on **J.R Misc Application No. 44 of 2012 - James**

Alfred Kosoro vs. The Attorney General at Nairobi 2013 eKLR, High Court of Kenya at Eldoret Civil Case No.194 of 2009 - ASIS Hotel Limited vs. The Hon. Attorney General and others 2011 eKLR, Environment and Land Court of Kenya at Nakuru ELC Case No. 88 of 2012 - Toyobo Investments Ltd. vs. Attorney General 2015 eKLR.

10. On the part of the Respondents it was submitted that interest is not payable. According to the Respondent, **Lady Justice Kamau** set aside compound interest at 17.5% which was given in the arbitral award. Since there was no further order regarding the payment of interest, t was submitted that no interest ought to accrue on the principle amount. It was however submitted that even if interest was payable, based on **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** and **Autolog Kenya Lmited vs. Navisat Telematics (Kenya) Limited [2013] eKLR**, such interest would only accrue from the date of filing of these judicial review proceedings and not from the date of the award and even then at the Court rate of 12% on a reducing balance hence the sum due would be Kshs 6,680,820.76. In further support of this position the Respondents relied on **Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Othes [2014] eKLR.**

Determination

11. I have considered the issues raised in this matter that is relevant to the issue at hand which is whether interests is payable, and if so at what rate.

12. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. "***

13. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441,** it was held:

> **"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".**

14. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, expressed himself, *inter alia*, as follows:

"*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile… It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government…Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through

Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

15. **I have reproduced the aforesaid decisions in order to show the circumstances under which the Court exercises its supervisory or judicial review jurisdiction in granting an order of *mandamus*. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In matters where the applicant claims that the Respondent ought to be compelled to pay a certain amount of money it does not suffice to simply aver that the Respondent is under an obligation to settle its liability to the Applicant. The Applicant must go a step further and prove that the sum claimed is actually due. Where therefore liability is admitted or proved, the next stage is to prove the actual quantum payable and where the said sum is yet to be determined an order of *mandamus* cannot go forth for payment of the said sum.**

16. **On the other hand where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to the exact sums payable, the Court will not by an order of**

***mandamus,* compel the Respondent to perform that duty until the dispute is sorted out.**

17. **Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner for example by compelling the respondent to pay a particular amount unless that amount has been ascertained. This position was appreciated by the Court of Appeal in** the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..."**

18. With respect a claim for *mandamus* against the Government to settle decretal sum, the position was correctly stated by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** as follows:

> **"The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the Government is found in section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon. Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgement. Once the certificate of order against the Government is served on the Hon. Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. The Respondent's claim that the Applicant should have waited until the start of the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the Government are not left without remedy at any time of the year."**

19. It follows that *mandamus* will only issue for the settlement of the sum decreed.

20. In this case, according to the decree arising from the consent the total sum decreed is indicated as Kshs 31,873,133.80. There is however no mention of interest. According to the said decree one of the orders which was sought in the application that gave rise to the consent order was prayer 5 which sought "an order for interest as ordered by the arbitrator from the date of the award till payment in full". However in the decree this prayer is indicated as having been dismissed. The effect of recording of a consent is that the claim in question is compromised. The effect of compromise was explained in **Ismail Sunderji Hirani vs. Noorali Esmail Kassam [1952] 19(1) EACA 131** to the effect that:

> **"where the suit has been settled by a compromise recorded under Order 24, rule 6, which is**

the present case. In such case, the decree is passed upon the new contract between the parties which supersedes the original cause of action...The contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of a Judge… It is now settled that the compromise of a disputed claim made bona fide is a good consideration, even though it ultimately appears that the claim was wholly unfounded: *aliter*, if the claim was not made in good faith… The mode of paying the debt, then is part of the consent-judgement. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. *Prima-facie*, any order made in the presence of the counsels is binding on all the parties to the proceedings or action and on those claiming under them...and cannot be varied and discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the Court....; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason that would enable the Court to set aside an agreement."

21. Whereas this Court appreciates that the ex parte applicant's claim for the award of interest may not be farfetched, this Court exercising its judicial review jurisdiction in these kind of matters on compels the payment of what is decreed as due and not what ought to have been due since the Court does not deal with merits. Therefore without pinpointing to a specific order that expressly awarded interest to the ex parte applicant after the decree was entered, for this Court to direct the Respondents to pay interest to the ex parte applicant, this Court would in effect be varying the decree, a jurisdiction this Court does not have. If the ex parte applicant feels that interests ought to paid to him as a result of the delay in settling the sum due to him, he must first seek to have the decree varied to reflect the same before this Court may compel the Respondents to pay.

22. My view is anchored on section 21 of the ***Government Proceedings Act***, which obliges the respondents to pay the amount for the time being contained on the face of the certificate. This was the position adopted by **Wendoh, J** in **Arthur Kinuthia Albert vs. Permanent Secretary, Ministry of Health [2008] eKLR** which position I associate myself with and in which the learned Judge expressed herself inter alia as follows:

"The question I pose is whether it is this court to determine what sum is payable in terms of interest. Judicial review merely deals with the decision making process but not the merits of the decision. In my view, the applicant's Counsel is calling upon this court to determine whether or not interest was payable to them and I am of the view that that is not the purview of this court's jurisdiction. The figure of interest included in the decree is foreign to the judgement in CMCC 773/03. Interest may vary according to what the Plaintiff has pleaded in the plaint. It is outside this court's jurisdiction to assume and to determine whether or not interest was payable or how much is payable. Since the court in CMCC 773/03 had not specifically ordered for payment of interest it was upon the Applicant to move the court which gave the judgement for a review of its orders on account of there being an error on the face of the record. This court's jurisdiction is limited to compelling the Respondent to pay based on the judgement, decree and certificate of order but it is not to determine what is due to the Applicant and this court would decline to grant the order prayed."

23. Accordingly, there is no basis upon which I can award interest in these proceedings without the decree giving rise to these proceedings is reviewed accordingly. In the premises I decline to award any interest to the applicant herein.

24. In the spirit of Article 159(2)(c) of the Constitution, each party will bear own costs of the instant proceedings.

25. Orders accordingly.

Dated at Nairobi this 23rd day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiarie for the Respondent

Mr Ochieng, the applicant in person

CA Mwangi